

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Lorraine Pimentel,)	No. CV09-1649-PHX-NVW
)	
Plaintiff,)	ORDER AND OPINION
)	
vs.)	
)	
Michael J. Astrue, Commissioner of Social)	
Security,)	
)	
Defendant.)	
)	

Lorraine Pimentel seeks review under 42 U.S.C. § 405(g) of the decision of the Commissioner of Social Security (“the Commissioner”) denying disability benefits. Because the decision of the Administrative Law Judge (“ALJ”) is not supported by substantial evidence and is based on legal error, the Commissioner’s decision will be vacated and remanded for further administrative proceedings.

I. Background

Pimentel, now forty-three years old, has been diagnosed with rheumatoid arthritis, fibromyalgia, hepatitis C, carpal tunnel syndrome, and degenerative disc disease of the cervical and lumbar spine, among other things. She applied for a period of disability and disability insurance benefits on December 19, 2005, alleging disability beginning December 10, 2005. She was insured through March 31, 2008, and must establish

1 disability on or before that date to be entitled to a period of disability and disability
2 insurance benefits.

3 Pimentel appeared and testified at a hearing held by an administrative law judge
4 (“ALJ”) on August 21, 2008. The ALJ issued an unfavorable decision on October 14,
5 2008. Among other things, the ALJ found that Pimentel “had the residual functioning
6 capacity to perform the full range of light and sedentary work” and her “past relevant
7 work as a retail sales clerk, distribution clerk, and bank teller did not require the
8 performance of work-related activities precluded by the claimant’s residual functional
9 capacity.” (Tr. 21.) The ALJ’s decision became the final decision of the Commissioner
10 on June 12, 2009.

11 Pimentel seeks vacature of the ALJ’s decision, contending it is based on legal error
12 and fails to properly address the disabling symptoms of rheumatoid arthritis,
13 fibromyalgia, and headaches.

14 **II. Standard of Review**

15 The district court reviews only those issues raised by the party challenging the
16 ALJ’s decision. *See Lewis v. Apfel*, 236 F.3d 503, 517 n.13 (9th Cir. 2001). The district
17 court may set aside the Commissioner’s disability determination only if the determination
18 is unsupported by substantial evidence or is based on legal error. *Orn v. Astrue*, 495 F.3d
19 625, 630 (9th Cir. 2007). Substantial evidence is more than a scintilla, less than a
20 preponderance, and relevant evidence that a reasonable person might accept as adequate
21 to support a conclusion considering the record as a whole. *Id.* In determining whether
22 substantial evidence supports a decision, the court must consider the record as a whole
23 and may not affirm simply by isolating a “specific quantum of supporting evidence.” *Id.*

24 The ALJ is responsible for resolving conflicts in medical testimony, determining
25 credibility, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
26 1995). However, in reviewing the ALJ’s reasoning, the court is “not deprived of [its]
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1 faculties for drawing specific and legitimate inferences from the ALJ's opinion."

2 *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).

3 **III. Analysis**

4 To determine whether a claimant is disabled for purposes of the Social Security
5 Act, the ALJ follows a five-step sequential evaluation process. 20 C.F.R. § 404.1520(a).
6 At step two, the ALJ found that Pimentel had the following severe impairments:
7 fibromyalgia, hepatitis C, rheumatoid arthritis, carpal tunnel syndrome, and degenerative
8 disc disease of the cervical and lumbar spine. At step three, the ALJ found that through
9 March 31, 2008, the date last insured, Pimentel did not have an impairment or
10 combination of impairments that met or medically equaled one of the listed impairments
11 in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R. § 404.1520(d), 404.1525, and
12 404.1625). Pimentel does not allege any error at any of the first three steps of the
13 sequential evaluation process.

14 The core issue in this appeal is whether the opinion of a rheumatologist (who treats
15 Pimentel for rheumatoid arthritis, degenerative disc disease, and fibromyalgia) that
16 Pimentel's pain and fatigue precludes full-time work was properly rejected, and
17 Pimentel's subjective testimony properly found to lack credibility, because a neurologist
18 (who treated Pimentel for lumbar disc protrusion and carpal tunnel syndrome) found
19 insufficient objective evidence of pain and fatigue severe enough to preclude full-time
20 work. A secondary issue is whether the ALJ's conceded error in failing to assess
21 Pimentel's work-related abilities on a function-by-function basis before expressing her
22 residual functional capacity in terms of the exertional levels of work, *i.e.*, light and
23 sedentary, is harmless and does not warrant remand because the ALJ presented to the
24 vocational expert a hypothetical based on a non-treating, non-examining physician's
25 function-by-function assessment.

A. The ALJ Erred in Rejecting the Opinion of Treating Rheumatologist Ravi Bhalla, M.D.

1. Legal Standard

In weighing medical source opinions in Social Security cases, the Ninth Circuit distinguishes among three types of physicians: (1) treating physicians, who actually treat the claimant; (2) examining physicians, who examine but do not treat the claimant; and (3) non-examining physicians, who neither treat nor examine the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Generally, more weight should be given to the opinion of a treating physician than to the opinions of non-treating physicians. *Id.* A treating physician's opinion is afforded great weight because such physicians are "employed to cure and [have] a greater opportunity to observe and know the patient as an individual." *Sprague v. Bowen*, 812 F.2d 1226, 1230 (9th Cir. 1987). Where a treating physician's opinion is not contradicted by another physician, it may be rejected only for "clear and convincing" reasons, and where it is contradicted, it may not be rejected without "specific and legitimate reasons" supported by substantial evidence in the record. *Lester*, 81 F.3d at 830. Moreover, the Commissioner must give weight to the treating physician's subjective judgments in addition to his clinical findings and interpretation of test results. *Id.* at 832-33.

Further, an examining physician's opinion generally must be given greater weight than that of a non-examining physician. *Id.* at 830. As with a treating physician, there must be clear and convincing reasons for rejecting the uncontradicted opinion of an examining physician, and specific and legitimate reasons, supported by substantial evidence in the record, for rejecting an examining physician's contradicted opinion. *Id.* at 830-31.

The opinion of a non-examining physician is not itself substantial evidence that justifies the rejection of the opinion of either a treating physician or an examining physician. *Id.* at 831. Factors that an ALJ may consider when evaluating any medical opinion include "the amount of relevant evidence that supports the opinion and the quality

1 of the explanation provided; the consistency of the medical opinion with the record as a
 2 whole; [and] the specialty of the physician providing the opinion.” *Orn*, 495 F.3d at 631.
 3 The opinion of any physician, including a treating physician, need not be accepted, “if
 4 that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Bray*
 5 *v. Comm’r*, 554 F.3d 1219, 1228 (9th 2009).

6 Moreover, Social Security Rules expressly require a treating source’s opinion on
 7 an issue of a claimant’s impairment be given *controlling* weight if it is well-supported by
 8 medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent
 9 with the other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2). If a
 10 treating source’s opinion is not given controlling weight, the weight that it will be given is
 11 determined by length of the treatment relationship, frequency of examination, nature and
 12 extent of the treatment relationship, relevant evidence supporting the opinion, consistency
 13 with the record as a whole, the source’s specialization, and other factors. *Id.*

14 Finding that a treating physician’s opinion is not entitled to controlling weight
 15 does not mean that the opinion should be rejected:

16 [A] finding that a treating source medical opinion is not well-
 17 supported by medically acceptable clinical and laboratory diagnostic
 18 techniques or is inconsistent with the other substantial evidence in the case
 19 record means only that the opinion is not entitled to “controlling weight,”
 20 not that the opinion should be rejected. Treating source medical opinions
 are still entitled to deference and must be weighed using all of the factors
 provided in 20 C.F.R. §404.1527. . . . In many cases, a treating source’s
 medical opinion will be entitled to the greatest weight and should be
 adopted, even if it does not meet the test for controlling weight.

21 *Orn*, 495 F.3d at 631-32 (quoting Social Security Ruling 96-2p). Where there is a
 22 conflict between the opinion of a treating physician and an examining physician, the ALJ
 23 may not reject the opinion of the treating physician without setting forth specific,
 24 legitimate reasons supported by substantial evidence in the record. *Id.* at 632.

25 **2. Dr. Bhalla**

26 Ravi Bhalla, M.D., board certified in rheumatology, began treating Pimentel on
 27 October 3, 2005. (Tr. 219.) Blood tests established that Pimentel had a positive
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1 rheumatoid factor and antihistone antibodies, and Dr. Bhalla prescribed Plaquenil and
2 Lodine. (Tr. 217, 222-23.) Following the initial examination and treatment in October
3 2005, Dr. Bhalla continued to treat Pimentel for rheumatoid arthritis, fibromyalgia, and
4 related conditions for several years. On August 24, 2006, Dr. Bhalla assessed Pimentel as
5 having rheumatoid arthritis, sicca syndrome, and hepatitis C and prescribed tramadol and
6 Plaquenil. (Tr. 307.) On March 19, 2007, Dr. Bhalla assessed Pimentel as having
7 rheumatoid arthritis, sicca syndrome, hepatitis C, fibromyalgia, and cervical spondylosis
8 and prescribed tramadol, doxycycline, Plaquenil, and Skelaxin. (Tr. 441.) On May 21,
9 2007, Dr. Bhalla assessed Pimentel as having rheumatoid arthritis, sicca syndrome,
10 hepatitis C, fibromyalgia, cervical spondylosis, and migraine headaches and prescribed
11 tramadol, Plaquenil, Skelaxin, and doxycycline. (Tr. 436-37.) On December 20, 2007, Dr.
12 Bhalla assessed Pimentel as having rheumatoid arthritis, sicca syndrome, hepatitis C,
13 fibromyalgia, cervical spondylosis, and migraine headaches and prescribed tramadol,
14 Plaquenil, Skelaxin, Relafen, and methocarbamol. (Tr. 467-68.) On April 22, 2008, Dr.
15 Bhalla assessed Pimentel as having rheumatoid arthritis, sicca syndrome, hepatitis C,
16 fibromyalgia, cervical spondylosis, and migraine headaches and prescribed tramadol,
17 Plaquenil, Topamax, Flexeril. (Tr. 466.) He also ordered an MRI of the lumbar spine
18 and consultation with a specialist for epidural blocks of the lumbosacral spine. (*Id.*)

19 Dr. Bhalla's diagnosis of rheumatoid arthritis is supported not only by the October
20 2005 blood test, but also by December 2006 MRIs of both of Pimentel's wrists and
21 metacarpophalangeal joints that revealed deterioration of both wrists and an erosion of
22 the metacarpophalangeal joints on the right hand consistent with rheumatoid arthritis.
23 (Tr. 122-23.) Physical examination in December 2007 revealed synovitis in multiple
24 joints, Heberden's nodes, Bouchard's nodes, crepitus of both knees, tenderness of both
25 ankles, and muscle spasms. (Tr. 468.) The June 2008 lumbar spine MRI indicated
26 degenerative changes of the L5-S1 level, which results in probable low-grade
27 impingement of the bilateral descending S1 nerve roots. (Tr. 472.)
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1 In March 2006, Dr. Bhalla opined that Pimentel could lift and carry 20 pounds
2 occasionally and 25 pounds frequently,¹ stand and/or walk at least 2 hours but less than 6
3 hours in an 8-hour day, and sit 4 hours in an 8-hour day. (Tr. 244-46.) In October 2006,
4 Dr. Bhalla opined that, in an 8-hour workday, Pimentel could lift and carry more than 10
5 pounds, less than 20 pounds; sit more than 2 hours, less than 3 hours; stand more than 1
6 hour, less than 2 hours; and walk less than 1 hour. (Tr. 143.) He further opined that
7 Pimentel's pain and fatigue put moderate to moderately severe limitations on her ability to
8 sustain work activity for 8 hours a day, 5 days a week. (Tr. 144.) In April 2007, Dr.
9 Bhalla again opined that, in an 8-hour workday, Pimentel could lift and carry more than
10 10 pounds, less than 20 pounds; sit more than 2 hours, less than 3 hours; stand more than
11 1 hour, less than 2 hours; and walk less than 1 hour. (Tr. 371.) He opined again that
12 Pimentel's pain and fatigue put moderate to moderately severe limitations on her ability to
13 sustain work activity for 8 hours a day, 5 days a week. (Tr. 372.)

14 The ALJ found, and the Commissioner does not dispute, that Pimentel had the
15 following severe impairments: fibromyalgia, hepatitis C, rheumatoid arthritis, carpal
16 tunnel syndrome, and degenerative disc disease of the cervical and lumbar spine. (Tr.
17 17.) The ALJ further found that these impairments cause significant limitations in
18 Pimentel's ability to perform basic work-related activities. (*Id.*) Nevertheless, the ALJ
19 rejected Dr. Bhalla's opinion that the fatigue and pain from these severe impairments
20 precluded Pimentel from full-time work.

21 The ALJ identified two reasons for rejecting Dr. Bhalla's assessment of Pimentel's
22 residual functional capacity:

23 After carefully reviewing all of the medical evidence and opinion, the
24 undersigned rejects Dr. Bhalla's assessment of the claimant's residual
25 functional capacity [*sic.*] several reasons; first, his opinion is contradicted
26 by the weight of credible medical evidence and opinion and second, it is
27 apparent that Dr. Bhalla has merely adopted the claimant's subjective

28 ¹Dr. Bhalla may have intended to opine that Pimentel could carry the lighter amount
frequently and the heavier amount occasionally.

1 allegations of impairment as his own and his assessment reflect [*sic.*] this
2 bias (Exhibit 1F/31-32).

3 (Tr. 20.) No evidence in the record, much less substantial evidence, supports the ALJ's
4 second reason for rejecting Dr. Bhalla's assessment. The ALJ's conclusion that Dr.
5 Bhalla has merely adopted Pimentel's subjective allegations of impairment is speculative.

6 The ALJ's first reason for rejecting Dr. Bhalla's assessment of Pimentel's residual
7 functional capacity, *i.e.*, "his opinion is contradicted by the weight of credible medical
8 evidence and opinion," conflicts with 20 C.F.R. § 404.1527(d) and the Ninth Circuit
9 standards for weighing medical opinions. The ALJ was required to apply the factors
10 listed in § 404.1527(d)(2)(i), (d)(2)(ii), and (d)(3)-(6): length of treatment relationship,
11 frequency of examination, nature and extent of the treatment relationship, supportability,
12 consistency with the record as a whole, specialization, and other factors. As discussed
13 above, Dr. Bhalla treated Pimentel for at least several years, examined her multiple times,
14 and specializes in treating rheumatology and fibromyalgia, and objective medical
15 evidence supports his findings. Thus, the ALJ was permitted to reject Dr. Bhalla's
16 opinion only for "clear and convincing" reasons or, if contradicted, only by identifying
17 "specific and legitimate reasons that are supported by substantial evidence in the record."
18 *Lester*, 81 F.3d at 830-31; *accord Carmickle v. Comm'r*, 533 F.3d 1155, 1164 (9th Cir.
19 2008). The ALJ's decision does not meet either standard.

20 **3. Dr. Schultz**

21 The ALJ assigned controlling evidentiary weight to the opinions of treating
22 physician Dale R. Schultz, D.O., examining physician Gregory Hunter, M.D., and
23 reviewing physician Steven Otto, M.D., J.D. Dr. Schultz is a board certified specialist in
24 psychiatry and neurology and in osteopathic neuropsychiatry. Dr. Schultz treated
25 Pimentel from 1999 through 2004 for back pain and carpal tunnel syndrome. He
26 examined her twice in 2006. On March 28, 2006, Dr. Schultz reported:

27 ...this 38-year-old female was last seen in September of 2004. At that time
28 she complained she is still having low back and lower extremity pain. We
 know from the past that she had a very large disc herniation at L5-S1 and

1 had been treated last year with epidural injections which helped to a
2 moderate degree but the pain is still problematic and we would think after
3 this period of time there should be some shriveling of the disc although she
is having more pain it may not reflect the size of the disc but just
inflammation.

4 She also has developed some problems with neck and right upper extremity
5 pain and numbness. Some of the pain in the upper extremity we feel is do
[sic.] to recurrent carpal tunnel syndrome on the right which was previously
6 documented clinically and by EMG which showed a median nerve latency
delay at the wrist.

7 (Tr. 257.) The ALJ did not refer to Dr. Schultz's March 28, 2006 report, which states
8 "the pain is still problematic," but instead relied solely on Dr. Schultz's April 11, 2006
9 report (Tr. 154-55) and focused on Dr. Schultz's opinion of Pimentel's credibility and
10 conclusion that she is not disabled, an issue reserved to the Commissioner under 20
11 C.F.R. § 404.1527(e)(1). The ALJ's decision quotes twice Dr. Schultz's statements that
12 Pimentel "constantly reminds me that I need to fill out forms attesting to her disability"
13 and, with added emphasis (both bold and underlining), "I do not feel she is disabled by
14 either her carpal tunnel syndrome or her low back problem and have refused to make
15 medical statements to that effect." (Tr. 18, 19.) The ALJ's decision characterizes
16 "constantly reminds me" as "harassing." (Tr. 18.)

17 Further, from Dr. Schultz's April 11, 2006 statement that Pimentel "resists
18 epidural injections," which he previously described as only moderately helpful, the ALJ's
19 decision states that "medical evidence . . . shows that the claimant pointedly refused to
20 accept treatment (which would have alleviated her alleged lower back pain) choosing
21 instead over-the-counter medications to treat her alleged pain." (Tr. 18.) Even if the
22 ALJ's decision drew only proper inferences from Dr. Schultz's reports and did not give
23 weight to an opinion on an issue reserved to the Commissioner, Dr. Schultz's opinion
24 regarding the severity and intensity of the effects of Pimentel's carpal tunnel syndrome
25 and low back pain does not conflict with Dr. Bhalla's opinion regarding the severity and
26 intensity of the effects of Pimentel's rheumatoid arthritis and fibromyalgia.

27 4. Dr. Hunter

1 The ALJ's decision also states that he assigned controlling weight to the
2 evidentiary summary and conclusions of State agency consulting examiner Gregory
3 Hunter, M.D., a neurologist, although the ALJ did not provide any specific reference to
4 evidence in the record. (Tr. 20.) Dr. Hunter diagnosed Pimentel with migraine and
5 multiple chronic pain and opined that her conditions would not impose any limitations for
6 12 continuous months. (Tr. 182.) Dr. Hunter noted Pimentel appeared to have migraine
7 with associated sleep disorder and "suspected that her difficulties with migraine
8 management do overlap into difficulties with chronic pain management." (Tr. 186.) She
9 did not "show any focal abnormalities to suggest a specific structural neurologic
10 impairment." (*Id.*) Dr. Hunter did not observe any clear neurological basis for her
11 multiple chronic pains. (Tr. 186.) However, Dr. Hunter's evidentiary summary and
12 conclusions regarding Pimentel's migraine and multiple chronic pain do not conflict with
13 Dr. Bhalla's opinion regarding the severity and intensity of the effects of Pimentel's
14 rheumatoid arthritis and fibromyalgia.

15 Moreover, the ALJ's decision states, "Dr. Hunter reviewed several MRI
16 examinations of the claimant's lumbar spine, the latest dated June 23, 2004, which
17 revealed a broad posterior disc protrusion that did not affect the S1 nerve root or impinge
18 on it." (Tr. 20.) But Dr. Hunter's report stated the June 23, 2004 MRI showed a "fairly
19 broad posterior disc extrusion that favors the right although it does yield effect on the left
20 S1 nerve root and a little more effect on the right S1 nerve root where it displaces it
21 against the right facet slightly. (Tr. 186.) And Dr. Schultz reported that her 2002 MRI
22 scan showed a disc protrusion at L5-S1 "now abutting the S1 nerve roots," her June 2004
23 MRI scan showed "a disparate disc protrusion at L5-S1," and in September 2004 "without
24 question, she has a significant disc protrusion [at] L5-S1." (Tr. 259, 262-63.)

25 **5. Dr. Otto**

26 Further, the ALJ assigned controlling weight to the evidentiary summary and
27 conclusions of State agency reviewing consultant Steven Otto, M.D., J.D., a non-treating,
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1 non-examining obstetrician-gynecologist, even though the ALJ found, “Dr. Otto’s
2 conclusions were far more critical of the claimant’s subjective allegations than the
3 opinions of many of the other specialists who examined the claimant.” (Tr. 20.) First,
4 the opinion of a non-examining physician is not itself substantial evidence that justifies
5 the rejection of the opinion of either a treating physician or an examining physician,
6 *Lester*, 81 F.3d at 831, and second, the opinion of a physician need not be accepted, “if
7 that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Bray*,
8 554 F.3d at 1228.

9 Dr. Otto indicated that Pimentel’s primary diagnosis is rheumatoid arthritis and
10 secondary diagnosis is degenerative disk disease of the lumbar spine. (Tr. 134.) He
11 opined that Pimentel can lift and carry 20 pounds occasionally and 10 pounds frequently,
12 stand or walk about 6 hours in an 8-hour workday, and sit about 6 hours in an 8-hour
13 workday. (Tr. 135.) In the section of the physical residual functional capacity assessment
14 form seeking discussion of whether the severity of symptoms and their alleged effect on
15 function is consistent with the total medical and nonmedical evidence, Dr. Otto wrote
16 only: “partially credible: see comments.” (Tr. 139.) In the section of the physical
17 residual functional capacity assessment form asking whether there were treating or
18 examining source conclusions about Pimentel’s limitations or restrictions that were
19 significantly different from his findings, Dr. Otto checked the box for “yes.” (Tr. 140.)
20 Dr. Otto then was asked to explain why those conclusions are not supported by the
21 evidence in the file and to cite the source’s name and the statement date. (*Id.*) Dr. Otto
22 wrote only: “see discussion in comments.” (*Id.*) In the comments, Dr. Otto relied on Dr.
23 Schultz’s comment that he felt Pimentel was “working [the] system for financial gain.”
24 (Tr. 141.) He misstated Dr. Schultz’s reports as saying she “has refused most treatments
25 and is perhaps narcotic-seeking in behavior”; Dr. Schultz’s reports actually state that
26 Pimentel declined a previously moderately effective lumbar epidural injection, “choosing
27 to just take over-the-counter analgesics,” and “We are also disinclined to provide her any
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1 narcotics.” (*Id.*) Dr. Otto’s opinion plainly is “brief, conclusory, and inadequately
2 supported by clinical findings” and not entitled to controlling weight.

3 Even if treating physician Dr. Bhalla’s opinion conflicted with other medical
4 evidence, the ALJ erred by rejecting it without providing reasons supported by substantial
5 evidence in the record. *See Lester*, 81 F.3d at 830. But Dr. Bhalla’s opinion regarding
6 the severity of the effects of Pimentel’s rheumatoid arthritis and fibromyalgia did not
7 conflict with other medical evidence, and the ALJ erred by rejecting it without providing
8 clear and convincing reasons for doing so. *See id.*

9 **B. The ALJ Erred in Evaluating Pimentel’s Credibility.**

10 In evaluating the credibility of Pimentel’s testimony regarding subjective pain or
11 other symptoms, the ALJ was required to engage in a two-step analysis: (1) determine
12 whether Pimentel had presented objective medical evidence of an impairment that could
13 reasonably be expected to produce some degree of the pain or other symptoms alleged;
14 and, if so with no evidence of malingering, (2) reject Pimentel’s testimony about the
15 severity of the symptoms only by giving specific, clear, and convincing reasons for the
16 rejection. *See Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). To support a lack of
17 credibility finding, the ALJ is required to point to specific facts in the record that
18 demonstrate that Pimentel is in less pain than she claims. *Id.* at 592. To be found
19 credible regarding subjective pain or fatigue, a claimant is not required to: (1) produce
20 objective medical evidence of the pain or fatigue itself, or the severity thereof; (2)
21 produce objective medical evidence of the causal relationship between the medically
22 determinable impairment and the symptom; or (3) show that her impairment could
23 reasonably be expected to cause the severity of the alleged symptom, only that it could
24 reasonably have caused some degree of the symptom. *Smolen v. Chater*, 80 F.3d 1273,
25 1282 (9th Cir. 1996).

26 The ALJ found Pimentel had presented objective medical evidence of an
27 impairment that could reasonably be expected to produce some degree of the pain or other
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1 symptoms alleged and did not make a finding of malingering. However, the ALJ rejected
 2 Pimentel's testimony about the severity of the symptoms without giving specific, clear,
 3 and convincing reasons for the rejection. First, he gave general conclusory reasons:

4 The claimant alleges that she has been unable to work in any capacity due to
 5 her impairments and limitations, but the objective medical evidence and
 6 credible medical opinion does not support the claimant's subjective
 7 allegations, which diminishes her credibility.

8 While the claimant has alleged having severe fibromyalgia, hepatitis C,
 9 Rheumatoid arthritis, carpal tunnel syndrome, and degenerative disc disease
 10 of the cervical and lumbar spine, the medical evidence does not support her
 11 subjective allegation that these impairments have prevented her from
 12 working and, in fact, shows the claimant has exaggerated her limitations
 13 and symptoms, which diminishes her credibility.

14 (Tr. 19.)

15 Then, the ALJ identified Dr. Schultz's opinion and other unidentified sources as
 16 reasons for his adverse credibility determination:

17 As discussed above, on April 11, 2006, Dr. Schultz . . . made the following
 18 statement in his clinical report after examining the claimant: "She
 19 constantly reminds me that I need to fill out forms attesting to her disability.
 20 **I do not feel she is disabled by either her carpal tunnel syndrome or her**
 21 **low back problem and have refused to make medical statements to that**
 22 **effect** (emphasis added)." Dr. Schultz' opinion. Dr. Schultz examined the
 23 claimant on two occasions, in February and again in April 2006, and no
 24 fewer than five sources examined the claimant in 2006, but none of them
 25 found any definitive evidence to support her subjective allegations of pain
 26 (Exhibit 1F/42 and 61).

27 The undersigned assigns controlling evidentiary weight to Dr. Schultz'
 28 opinion. . . .

(Tr. 19.) The ALJ referenced Exhibit 1F/42, which is Dr. Schultz's April 11, 2006 report.

(Tr. 154.) As previously noted, opinions on issues reserved to the Commissioner, such as
 whether a claimant is disabled, are not medical opinions. 20 C.F.R. § 404.1527(e).

Moreover, the ALJ ignored Dr. Schultz's March 28, 2006 report, which states: "We know
 from the past that she had a very large disc herniation at L5-S1 and had been treated last
 year with epidural injections which helped to a moderate degree but the pain is still
 problematic" (Tr. 257.)

1 The ALJ also referenced Exhibit 1F/61, which is a Social Security Administration
2 Explanation of Determination that lists evidence used to decide Pimentel's claim. (Tr.
3 173.) It identifies two reports from Dr. Schultz, one from Dr. Hunter, one from Dr.
4 Bhalla (Valley Arthritis Care), one from Associated Foot & Ankle Specialist, and one
5 from Forty-Third Ave Med. Associates, P.C. (*Id.*) The Explanation of Determination
6 states only:

7 This is a 39 yr old with 10 yrs of formal education whose PRW is that of a
8 distribution clerk, mail handler for USPS and bank teller. DDS MC has
9 determined the clt has the ability for light type work. Clt describes PRW as
light as does the DOT 209.687-014 L4; 211.362-018 L5. Therefore, clt can
return to PRW as she describes and as performed in the national economy.

10 (Tr. 173.) At most, this evidence shows only that "DDS MC" had determined that
11 Pimentel was able to perform light work. It does not provide a specific, clear, and
12 convincing reason to reject Pimentel's subjective testimony.

13 Next, the ALJ provided his own opinion that if Pimentel really experienced severe
14 chronic pain, there would be objective evidence of it:

15 The undersigned notes that, if the claimant really experienced severe long-
16 term chronic pain, as she says she has, there would be some observable sign
17 of such pain, such as muscle atrophy, restricted motor function, muscle
18 weakness, compensation, and a number of other demonstrable signs of
severe long-term chronic pain, but the claimant has none and no treating or
examining source has reported any such evidence, which further diminishes
the claimant's credibility.

19 While the objective medical evidence . . . does not reflect any remarkable
20 findings, the claimant has continued to allege that she has severe
21 degenerative disc disease and chronic pain in her cervical spine. Similarly,
22 the claimant alleged that she has severe migranous headaches and
23 degenerative disc disease of the lumbar spine, but treating and examining
physicians have disagreed as to whether the alleged headaches are truly
migranous in nature or are vascular and whether she has exhibited any focal
abnormalities.

24 (Tr. 19.) It is unclear why the type of headache, *i.e.*, vascular or migraine, would be
25 relevant to determining the severity and limiting effect of headache pain. Regardless, an
26 ALJ may not reject subjective symptom testimony simply because there is no objective
27 evidence of the pain or fatigue or that the impairment can reasonably produce the degree
28 of symptom alleged. *Smolen*, 80 F.3d at 1282.

1 Further, the ALJ erroneously gave controlling weight to reviewing physician Dr.
2 Otto's opinion of Pimentel's subjective allegations even though his conclusions
3 admittedly were "far more critical" than those of the treating and examining specialists:

4 In December 2006, [Dr. Otto] reviewed all of the medical evidence and
5 concluded that the claimant's allegations of carpal tunnel syndrome and
6 migraine headaches were non-severe. Dr. Otto's conclusions were far more
critical of the claimant's subjective allegations than the opinions of many of
the other specialists who examined the claimant [].

7 The undersigned assigns controlling evidentiary weight to Dr. Otto's
8 evidentiary summary and conclusions since they are amply supported by
clear and unequivocal medical evidence (Exhibit 1F/22-29).

9 (Tr. 19-20.)

10 Finally, the ALJ erred by giving weight to the absence of opinion by Pimentel's
11 primary care physician James Beach, D.O., without giving a specific, clear, and
12 convincing reason for inferring from the absence of opinion that Dr. Beach actually held
13 an adverse opinion:

14 While James Beach, D.O., was the claimant's primary treating physician for
15 many, many years, far longer than any other treating source, Dr. Beach's
16 clinical records do not reflect limitations on the claimant's residual
functional capacity which have prevented her from performing light and
17 sedentary work as she has alleged, which significantly diminishes the
claimant's credibility. *The absence of any such limitations* and Dr. Beach's
18 numerous referrals to specialists in multiple fields of medicine who found
little or no physical cause for the claimant's alleged pains, radiculopathy,
and paresthesia in her extremities *further diminishes the claimant's*
19 *credibility* [].

20 (Tr. 20 (emphasis added).) Nor did the ALJ provide any reason for concluding that Dr.
21 Beach's numerous referrals to specialists diminishes Pimentel's credibility other than the
22 referrals did not result in objective evidence of her pain.

23 Thus, the ALJ committed legal error by requiring Pimentel to produce objective
24 medical evidence of her subjective pain and fatigue and the severity thereof, produce
25 objective medical evidence of the causal relationship between her medically determinable
26 impairments and the symptoms, and show that her impairment could reasonably be
27 expected to cause the severity of her pain and fatigue. *See Smolen*, 80 F.3d at 1282.

1 Also, the ALJ failed to give specific, clear, and convincing reasons for rejecting
2 Pimentel's subjective testimony. *See Vasquez*, 572 F.3d at 591.

3 **C. The ALJ's Expression of Residual Functional Capacity as "the Full**
4 **Range of Light and Sedentary Work" Is Reversible Error.**

5 At step four of the sequential evaluation process, the ALJ determined that Pimentel
6 "had the residual functional capacity to perform the full range of light and sedentary
7 work." (Tr. 18.) The Commissioner concedes that the ALJ erred by failing to assess
8 Pimentel's work-related abilities on a function-by-function basis before expressing her
9 residual functional capacity in terms of the exertional levels of work, *i.e.*, light and
10 sedentary, as required by SSR 96-8p. The Commissioner contends, however, that the
11 error is harmless because the ALJ ultimately relied on the vocational expert's testimony
12 regarding Dr. Otto's function-by-function assessment of Pimentel's residual functional
13 capacity. (Doc. 15 at 12-13.) As previously discussed, Dr. Otto's opinion was not
14 entitled to be given controlling weight. Therefore, the ALJ's failure to comply with SSR
15 96-8p cannot be deemed harmless merely because the ALJ and the vocational expert
16 relied on Dr. Otto's assessment.

17 **IV. Remand**

18 If the Commissioner's decision is not supported by substantial evidence or suffers
19 from legal error, the court has discretion to reverse and remand either for an award of
20 benefits or for further administrative proceedings. *Smolen*, 80 F.3d at 1292. The "credit-
21 as-true" rule requires that the Commissioner must accept as true a claimant's subjective
22 pain testimony if the ALJ fails to articulate sufficient reasons for refusing to credit it.
23 *Vasquez*, 572 F.3d at 593. The purpose of the rule is "to discourage ALJs from reaching
24 a conclusion about a claimant's status first, and then attempting to justify it by ignoring
25 any evidence in the record that suggests an opposite result." *Id.* But the rule applies only
26 when there are no outstanding issues that must be resolved before a proper disability
27 determination can be made, and where it is clear from the record that the ALJ would be
28 required to award benefits if the claimant's excess pain testimony were credited. *Id.*

1 Here, the ALJ failed to articulate sufficient reasons for refusing to credit
2 Pimentel's pain testimony. As in *Vasquez*, application of the credit-as-true rule would not
3 result in immediate payment of benefits because other issues must be resolved before a
4 proper disability determination can be made. Unlike *Vasquez*, however, Pimentel is only
5 forty-three years old, and no other factors justify applying the credit-as-true rule where
6 there are outstanding issues other than the claimant's subjective pain.

7 IT IS THEREFORE ORDERED that the Clerk enter judgment vacating the final
8 decision of the Commissioner of Social Security and remanding this case to the
9 Commissioner for further proceedings consistent with this order. The Clerk will please
10 close this case.

11 DATED this 19th day of November 2010.

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13 /S/
14 JOHN W. SEDWICK
UNITED STATES DISTRICT JUDGE
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